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IN THE

Supreme Court of the United States

October Term 1975

No. 75-1284

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,
Petitioner,

vs.

ROY SCHWARTZ,
Respondent.

RESPONDENT'S REPLY BRIEF

FLETCHER LAW OFFICES, LTD.
JOHN F. FLETCHER
1124 St. Germain St.
St. Cloud, Minn. 56301
(612) 252-5500
Attorneys for Respondent

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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RESPONDENT'S REPLY BRIEF

QUESTIONS PRESENTED FOR REVIEW

1. When Federal constitutional issues are not raised at trial or on appeal to the State Supreme Court, should the United States Supreme Court take jurisdiction to entertain a Petition for Writ of Certiorori?

2. May a State apply its Conflicts of Law Rules, held to be procedural, in its own best interests, when it enforces its decision equally against all parties involved, and provides adequate and equal methods to all parties to insure due process and equal protection?

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STATEMENT OF THE CASE

Respondent brought an action in his home State, Minnesota, to recover for personal injuries sustained in a Three (3) truck collision which occurred in the State of Indiana due to the negligence of Petitioner, Spector Freight System, Inc., and Consolidated Freightways Corporation of Delaware (not a party). The collision occurred on November 20th, 1964.

Respondent's vehicle was owned and operated by a Minnesota Corporation, garaged and licensed in Minnesota. Petitioner's vehicle was leased from an Ohio owner. The third vehicle was owned by Consolidated and licensed in Delaware.

Service was made to initiate this action by Respondent by service on Petitioner's duly appointed agent for service in the State of Minnesota and Petitioner answered, submitting to Minnesota jurisdiction.

The action was tried to a jury in District Court, Fourth Judicial District, State of Minnesota, and a verdict on special Interrogatories found the Consolidated Defendant Sixty Per Cent (60%) negligent, the Petitioner Thirty Per Cent (30%) negligent, and Respondent Ten Per Cent (10%) negligent. On motion, the trial Court entered judgment against Respondent ruling that contributory negligence barred Respondent from any recovery.

On appeal by Respondent, the Minnesota Supreme Court, Justice Yetka, reversed trial Court: holding that under Minnesota's Conflict of Laws Rules Minnesota's Comparative Negligence Statute applied to this case. In his opinion, Justice Yetka stated "while we hold that Minnesota's governmental interest is sufficient to apply the Minnesota Comparative Negligence Statute rather than the Contributory Negligence Law of the State of Indiana so that we need not decide the case under

the "better law rule", we feel compelled to point out that the jury's findings of only Ten Per Cent (10%) negligence on the part of Plaintiff and Ninety Per Cent (90%) negligence on the part of Defendants does little to convince us Indiana has the better law".

Petitioner did not argue or raise any constitutional issues at trial — on appeal — on its cross appeal — or on its first Petition for rehearing.

Petitioner, in a second Petition for rehearing, which was denied, attempted for the first time, to raise constitutional issues. After a subsequent appeal, again on other issues, Petitioner applied for this Writ of Certiorari raising, for the first time, constitutional issues.

ARGUMENT - JURISDICTION

Petitioner has made application for Writ of Certiorari attempting to raise alleged constitutional issues. The allowance of such a Writ is governed by revised Rule 19 of the Supreme Court of the United States which governs review on Certiorari. It reads in part:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.
>
> Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions on this court.

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The decision of the Minnesota Supreme Court sought to be reviewed herein was filed on August 2nd, 1974. Following such decision, Petitioner filed, not one, but two Petitions for rehearing before said Court and subsequently a second appeal, decided December 19th, 1975.

Minnesota Rule of Civil Appellate Procedure 140 governs procedure followed in Petitions for rehearing. In substance, it allows a Petition for rehearing to be filed within Ten (10) days after the filing of the decision unless the time is enlarged by order within the Ten (10) day period. (A copy of the Rule appears in full in the Appendix; p. A-1).

The first application for rehearing was presented to the Minnesota Supreme Court making complaint of certain alleged errors of admission of evidence during the trial; there were no constitutional issues raised in the first Petition for rehearing nor in any of the Court proceedings prior thereto, nor in its second appeal.

Following the first rehearing, Petitioner in this Writ, Spector Freight System, Inc., on August 29th, 1974, Twenty-seven (27) days after the above decision, applied to the Minnesota Supreme Court for a second opportunity to present a Petition for reargument. A letter (copy of which appears in the Appendix; p. (A-1) dated August 29th, 1974, from Spector Freight System's Counsel to the Minnesota Supreme Court, quoting:

> I have now been advised by my associates in Chicago that the general counsel for Spector Freight System, Mr. Irwin, as well as the general counsel for one of the reinsurers. Transport Insurance Company of Texas, have been on vacation and because of this, they were not able to make the necessary decision in regard to further appeal.

> I have now been advised to proceed with a petition for rehearing on constitutional grounds by the client. Such a Petition will necessarily require substantial research prior to submission, and I respectfully request an extension of time in which to file same to Monday, September 30th, 1974.

Minnesota's procedure requires certain prerequisites before a constitutional issue can be raised. These requirements include the following:

> When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him an opportunity to intervene.

Minnesota Rules of Civil Procedure for the District Court, Rule 24.04.

> When the constitutionality of an act of the legislature is drawn in question in any proceeding in the Supreme Court to which the state or an officer, agency, or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof.

Minnesota Rules of Civil Appellate Procedure, Rule 144.

"The failure to give proper notice of a challenge on constitutional ground to the Attorney General is jurisdictional." *State of Minnesota v. Roger Ettesvold*, 263 Minn. 411, 117 N.W.2d 1 (1962); *Village of Farmington v. Minnesota Municipal Commission*, 284 Minn. 125, 170 N.W.2d 197 (1969).

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It appears that the attempt to raise constitutional issues in this matter was an afterthought following the trial, following appeal to the Minnesota Supreme Court and following a Petition for rehearing. It was Twenty-seven (27) days after the Courts decision from the first appeal, and after the Courts denial of the first Petition for rehearing, that Petitioner attempted to raise a constitutional issue. This was followed by a second appeal decided December 19th, 1975, which made no reference to constitutional issues.

The required notice to the Attorney General for the State of Minnesota was not served and the Petition for rehearing on the alleged constitutional grounds was denied for lack of jurisdiction.

The Petitioner did not follow the required procedural rules pursuant to either the Minnesota District Court rules nor the Minnesota Appellate Rule as above outlined. The Petitioner here has not presented this Court with the required jurisdiction. The State Court did not decide a Federal question of substance, nor has it decided it in any way as required by Rule 19, supra. It was just not presented to it.

The United States Supreme Court does not grant certiorari under 28 U.S.C. 1257 (3), c. 646, 62 Stat. 929 for merely any Federal question presented to it. The Court has held time and again that the issue must provide a substantial Federal question and must have been raised in a proper and timely manner in the State Courts.

The timeliness with which the Federal questions were raised has been held to be critical and largely a matter for the State Court to regulate by its own procedural rules. *National Mutual Building and Loan Assc. v. Brakan*, 193 U.S. 635 (1964) and *Reece v. Georgia*, 350 U.S. 85 (1955).

In *Henry v. Mississippi*, 379 U.S. 443 (1965) the Court stated that it would decline to review State Court judgments which rest on adequate State grounds even if they also decide Federal questions. This affirmed an earlier statement the Court had made in *Walters v. City of St. Louis, Missouri*, 347 U.S. 231 (1954), where the Court stated simply that it would not pass on what the Court below had not decided.

Louisville and Nashville R. Co. v. Woodford, 234 U.S. 46 (1914). See also, *Erie R. Co. v. Pardy*, 185 U.S. 148 (1902) and *Baldwin v. Kansas*, 129 U.S. 52 (1889).

ARGUMENT

In the event the Petition is not dismissed on the above jurisdictional grounds, it should be dismissed on the merits for the following reasons.

Due process has been complied with. Petitioner was properly served by service upon its duly appointed agent for service in the State of Minnesota. Petitioner does business in the State of Minnesota. Following service, Petitioner answered, submitting to the jurisdiction of the State of Minnesota. Minnesota has and had jurisdiction.

Of what does Petitioner complain?

Comity does not require that the States enforce laws repugnent to their own. Minnesota has adopted the comparative negligence statute, Minnesota Statute 604.01 Subdivision 1 which reads as follows:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for neglience resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery

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> is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.

By such passage Minnesota has adopted comparative negligence as a public policy. This law applies equally to all persons and parties who come within its jurisdiction and has been held procedural.

In 1969, the Minnesota Court ruled that the Minnesota Comparative Negligence Statute, M.S. 604.01 enacted in 1969 must apply to any action, the trial of which commenced after July 1, 1969. The Court held that such statute could constitutionally be held retroactive in effect. *Peterson v. City of Minneapolis*, 285 Minn. 282, 173 NW2d 353 (1969); *Barnes v. Hammerschmidt*, 289 Minn. 181, 182 NW2d 875 (1971).

The Court held that the legislation did not interfere with vested rights and further compared the Comparative Negligence Law to a Statute of Limitations; holding that both were procedural rather than substantive in nature, saying that:

> It is generally held that legislation dealing only with remedies and procedures are not beyond the reach of retrospective legislation.

The Court further stated that the result does not, in effect, do away with contributory negligence but simply requires, as the Court stated:

> A balancing of the degree of Plaintiff's negligence against that of the Defendant.

By application of its own choice of law rules, Minnesota has determined what law governs the case following the principles set forth in *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965) in applying its conflicts of law rules and determining whether a given question is substantive or procedural. *Anderson v. State Farm Mutual Auto Ins. Co.*, 222 Minn. 428, 24 NW2d 836 (1946). In doing so it has ruled that the comparative negligence statute is procedural and has thus applied Minnesota's Conflict of Law Rules determining that Minnesota Statute 604.01 should apply to negligence actions venued in Minnesota Courts. *Peterson and Barnes, supra.*

Minnesota has consistently rejected and refused to apply foreign laws which were contrary to its public policy. *Blats v. Blats*, 273 Minn. 419, 142 NW2d 66 (1966). *Schneider v. Nichols*, 280 Minn. 139, 158 NW2d 254 (1968). *Kopp v. Rechtzigel*, 273 Minn. 441, 141 NW2d 526 (1966). *Bolgrean v. Stich*, 293 Minn. 8, 196 NW2d 442 (1972).

The Minnesota Legislature expressed its confidence that comparative negligence was a better rule by enacting the same into law while expressly rejecting contributory negligence. Subsequently, the Minnesota Supreme Court endorsed the legislature's actions by expressly stating in *Peterson v. City of Minneapolis*, supra that comparative negligence was the better rule. In *Milkovich v. Saari*, 295 Minn. 520, 203 NW2d 408 (1973) the Minnesota Court again expressly rejected the Lex loci Doctrine basing its decision primarily on the case law of

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New York and New Hampshire; stating that in dealing with choice of law problems Minnesota has chosen a methodology of analysis rather than a series of rules, and that Minnesota will follow the better law concept in choice of law situations.

With all due respect to the "head count" of the listed jurisdictions in Petitioner's Brief, it appears there is little, if any, substantial differences in the jurisdictions which follow "the most significant contact rules", the "governmental interest analysis" doctrine and the "choice influencing considerations".

It can be seen that Minnesota, the Restatement (Second) of Conflict of Laws, sec. 6 and many other jurisdictions have changed from the hard and fast rule of Lex loci to allowing either the law of the forum or the law of the foreign State to be applied, depending on the respective interests and contacts.

As discussed previously, both the Minnesota State Legislature and the Minnesota State Supreme Court have expressed their approval of the Minnesota Comparative Negligence Statute. There is little question that in this case, or any case, Minnesota Negligence law is the better law assuring fair and equitable results and effectuating State public policy. Minnesota is intimately and significantly concerned with the final disposition of this matter.

No resident or corpration of Indiana is concerned nor was any property of a resident or corporation of that State damaged. Indiana's only tie with the present action is that it was the site of the collision.

On the other hand, Minnesota is intimately and significantly concerned with the final disposition of this matter and as stated by the Courts opinion:

> The factual contacts creating a Minnesota interest in the instant case appear much stronger than those factual con-

tacts present in Milkovich. Here, plaintiff is a lifelong resident of Minnesota and sustained his injuries in the course of his employment as a truck driver for a Minnesota corporation. The vehicle which he was driving was owned by this Minnesota employer, and was licensed, registered, garaged, maintained, and insured in Minnesota. Plaintiff had a Minnesota driver's license. The excursion which had brought plaintiff to Indiana originated in Minnesota and was to terminate in Minnesota (although the load plaintiff was hauling was to be delivered to Fargo, North Dakota). Plaintiff has received and continues to receive medical care in Minnesota for the injuries sustained in the accident. He currently resides in Minnesota, saddled with crippling physical disabilities arising from the collision. Thus the economic impact of these injuries and of subsequent litigation will be felt by Minnesota residents. In addition, both defendant corporations, although foreign to Minnesota, are licensed to do business in this state, and presumably exercise this privilege. Minnesota therefore has a clear governmental interest in the outcome of plaintiff's case.

CONCLUSION

Respondent respectfully submits that Petitioner has wholly failed to properly raise any Federal constitutional questions in a timely manner in State Court as required by Minnesota Rules of Civil Procedure, Minnesota Rules of Civil Appellate Procedure and the Case Law of this Court. Thus the jurisdiction of this Court should not be exercised to grant the requested Writ of Certiorari.

Once jurisdiction attached, the State of the forum may, subject to due process standards, apply its own choice of law rules to determine what law governs the case. The application by the State of Minnesota of its conflict of law rules is a State procedural matter. The Minnesota Courts have provided adequate methods to all parties to protect their constitutional rights. Under Minnesota's Conflict of Law Rules, its Comparative Negligence Law was properly applied.

Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

FLETCHER LAW OFFICES, LTD.

By John F. Fletcher
Attorneys for Respondent
1124 St. Germain Street
St. Cloud, Minn. 56301
(612) 252-5500

APPENDIX

RULE 140. PETITION FOR REHEARING

A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity any controlling statute, decision, or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived. The petition shall be served upon the opposing party who may answer within 5 days thereafter. Oral argument in support of the petition will not be permitted. Eleven copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk, except that any duplicated copy, other than a carbon copy, of a typewritten original may also be filed. A filing fee of $25.00 shall accompany the petition for rehearing. The filing of a petition for rehearing stays the entry of judgment until disposition of such petition. It does not stay the taxation of costs.

August 29, 1974

Mr. John McCarthy
Clerk of Supreme Court
Room 230—State Capitol
St. Paul, Minnesota 55101

Dear Mr. McCarthy:

Re: Schwartz v. Consolidated v. Spector, et al File No. 44158, 44281, 44509, 44525

As I indicated in our phone conversation of August 29, I did not receive the Court's decision in the above matter until Wednesday, August 7, because of the fact that it had first been

sent to my former office and was then forwarded by them. I was not able to reach my principal until Friday, August 9. I did thereafter have several discussions with my client's Chicago counsel regarding possible appeal to the U. S. Supreme Court. They asked for time to reflect on the decision and in that connection, I asked for and received from the Court a ten-day extension to August 22 in which to file a petition for rehearing, which would, for the first time, raise certain Constitutional grounds.

I have now been advised by my associates in Chicago that the general counsel for Spector Freight Systems, Mr. Irwin, as well as the general counsel for one of the reinsurers, Transport Insurance Company of Texas, have been on vacation and because of this, they were not able to make the necessary decision in regard to further appeal.

I have now been advised to proceed with a petition for rehearing on Constitutional grounds by the client. Such a petition will necessarily require substantial research prior to submission, and I respectfully request an extension of time in which to file same to Monday, September 30, 1974.

Thank you very much for your willingness to present this request to the Court.

Sincerely,

GEORGE M. ROEHRDANZ

GMR/kc

cc: Mr. John F. Fletcher
Mr. Robert J. McGuire
Mr. Leroy A. Garr

24.04 Notice to Attorney General

When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an offi-

cer, agency or employe of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him an opportunity to intervene.

RULE 144. CASES INVOLVING CONSTITUTIONAL QUESTIONS WHERE STATE IS NOT A PARTY

When the constitutionality of an act of the legislature is drawn in question in any proceeding in the Supreme Court to which the state or an officer, agency, or employee of the sttae is not a party the ,party asserting the unconstitutionality of the act shall notify the attorney general thereof.

604.01 Comparative negligence, effect

Subdivision 1. Scope of application. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, however, that each shall remain jointly and severally liable for the whole award.